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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JACK DUCKWORTH,
Petitioner,
vs.
ISADORE SERRANO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Seventh Circuit erroneously held that Respondent Serrano was not required to exhaust his state court remedies before presenting the question of conflict of interest on the part of his counsel to the federal courts under 28 U.S.C. §2254, a holding directly in conflict with the provisions of 28 U.S.C. §2254(b) and with prior applicable decisions of this Court.

Whether the Seventh Circuit erred (1) in determining that the uncontested facts show that, at the time of trial, Serrano's attorney was representing an important state's witness and (2) in establishing a *per se* rule that such representation denies effective assistance of counsel.

TABLE OF CONTENTS

PAGE:

Questions Presented for Review i

Table of Authorities iv

Opinions Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved ... 2

Statement of the Case 4

Facts Material to the Consideration of the Questions Presented 4

Reasons for the Allowance of the Writ 6

The Seventh Circuit Erroneously held that Respondent Serrano was not Required to Exhaust his State Court Remedies Before Presenting the Question of Conflict of Interest On the Part of his Counsel to the Federal Courts Under 28 U.S.C. §2254, a Holding Directly in Conflict with the provisions of 28 U.S.C. §2254(b) And with Prior Applicable Decisions of this Court. 6

The Seventh Circuit Erred (1) in Determining That the Uncontested Facts Show that, at the Time of the Trial, Serrano's Attorney was Representing an Important State's Witness And (2) in Establishing a *per se* Rule That such Representation Denies Effective Assistance of Counsel 9

Conclusion 12

Appendix A-1

Order of the Seventh Circuit A-1

Memorandum Opinion of the District Court A-4

Judgment of the District Court A-12

TABLE OF AUTHORITIES

CASES:	PAGE:
Cuyler v. Sullivan, ___ U.S. ___, 100 S.Ct. 1708 (1980)	10, 11
Evans v. Lane, 419 F.2d 1337 (7th Cir. 1970)	8
Ex Parte Hawk, 321 U.S. 114 (1944)	7
Ex Parte Royall, 117 U.S. 241 (1886)	7
Fay v. Noia, 372 U.S. 391 (1963)	7
Kidwell v. Phend, 26 Ind. Dec. 106 (S.D. Ind. 1971)	8
Langley v. State, 256 Ind. 199, 267 N.E.2d 538 (1971)	8
Picard v. Connor, 404 U.S. 270 (1971)	7
Pitchess v. Davis, 421 U.S. 482 (1975)	7
Preiser v. Rodriguez, 411 U.S. 475 (1973)	7
Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980)	11
United States v. United States Gypsum Company, 333 U.S. 364 (1948)	10
Wilwording v. Swenson, 404 U.S. 249 (1971)	7

OTHER AUTHORITY:	
28 U.S.C. §1254(1)	2
28 U.S.C. §2101(c)	2
28 U.S.C. §2254	2, 6
28 U.S.C. §2254(b)	2, 8, 9
28 U.S.C. §2254(c)	7
Rules of Supreme Court 17.1(a)	2
Rules of Supreme Court 20.2	2
Indiana Post Conviction Remedy Rule 1	3, 7, 8

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Jack Duckworth, respectfully prays this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) entered in Cause Number 80-1658 on March 5, 1981, which reversed the judgment of the United States District Court for the Northern District of Indiana, South Bend Division (hereinafter District Court).

OPINIONS BELOW

The order of the Seventh Circuit issued on March 5, 1981, has not been officially reported. A copy of the order is appended hereto at page A-1. The June 8, 1979, memorandum and order of the District Court has not been

officially reported. A copy of said memorandum and order is appended hereto at A-4.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 17.1(a) of the Rules of this Court to review a decision of the federal court of appeals that has decided a federal question in a way which conflicts with 28 U.S.C. §2254(b) and applicable decisions of this Court.

The decision of the Seventh Circuit was entered on March 5, 1981. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101(c) and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. §2254 provides as follows:

> §2254. State custody; remedies in Federal courts
>
> (a) the Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * *

The Indiana Rules of Procedure for Post-Conviction Remedies provide as follows:

Section 1. Remedy—To whom available—Conditions.

(a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims:

(1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;

(2) that the court was without jurisdiction to impose sentence;

(3) that the sentence exceeds the maximum authorized by law, or is otherwise erroneous;

(4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

(5) that his sentence has expired, his probation, parole or conditional release unlawfully revoked, or his is otherwise unlawfully held in custody or other restraint;

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;

may institute at any time a proceeding under this Rule to secure relief.

* * *

STATEMENT OF THE CASE

This petition arises from the reversal, by the Seventh Circuit, of a decision by the District Court in the case of *Serrano v. Duckworth*, Cause Number S79-74, whereby the District Court dismissed a petition for a writ of habeas corpus filed by Respondent Serrano (petitioner below).

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

Respondent, a prisoner at the Indiana State Prison, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254, in the District Court, alleging that his conviction in the state court was constitutionally infirm for several reasons. Petitioner (respondent below) filed his Response to Order to Show Cause on April 19, 1979. The District Court issued its Memorandum and Order, dismissing the petition, on June 8, 1979 (see, Appendix pages A4-A11), Respondent Serrano appealed this determination to the Seventh Circuit raising the issues of sufficiency of the evidence and conflict of interest of his trial counsel in violation of the Sixth Amendment. The Seventh Circuit reversed this cause on the Sixth Amendment issue and did not reach or decide the question of sufficiency of the evidence.

Respondent, Isadore Serrano, was charged with the murder of Debra Gomez. Miss Gomez was killed near the hothouse in Sunnyside Park, East Chicago, Indiana. At

trial, the state presented testimony to the effect that Serrano had been observed by a policeman shortly after the murder approximately seven blocks from the park wearing clothing generally matching the description of a man seen running from the hothouse, and that he had scratches on his hands. The state also called Norma Hernandez, who had been arrested on a criminal charge, unrelated to the Gomez slaying, and had made a statement to the police to the effect that Serrano had told her that he had killed Debra Gomez. Mrs. Hernandez testified about that statement and the circumstances surrounding it. She said that she had been arrested for robbery at the time she made the statement and that Walker was her attorney. The firm of Walker & Walker represented Serrano at trial. On cross-examination by Mr. William Walker, Mrs. Hernandez stated that the firm of Walker & Walker had represented her on a traffic ticket in the past and that she had asked Mr. Walker if he would represent her on the pending criminal charge but that he did not represent her up to that time.

Serrano was convicted of first degree murder and murder in the perpetration of or attempt to perpetrate rape. He appealed this conviction to the Indiana Supreme Court which is reported in *Serrano v. State*, 266 Ind. 126, 360 N.E.2d 1257 (1977). He did not present the issue of ineffectiveness of counsel to the state courts in that appeal or at any other time. The Indiana Supreme Court affirmed the conviction and Serrano subsequently filed a Petition for Writ of Habeas Corpus in the District Court raising essentially the same issues he presented on appeal. Serrano appealed the dismissal of this petition to the Seventh Circuit where, for the first time, he alleged a conflict of interest on the part of his trial counsel.

REASONS FOR ALLOWANCE OF THE WRIT

THE SEVENTH CIRCUIT ERRONEOUSLY HELD THAT RESPONDENT SERRANO WAS NOT REQUIRED TO EXHAUST HIS STATE COURT REMEDIES BEFORE PRESENTING THE QUESTION OF CONFLICT OF INTEREST ON THE PART OF HIS COUNSEL TO THE FEDERAL COURTS UNDER 28 U.S.C. §2254, A HOLDING DIRECTLY IN CONFLICT WITH THE PROVISIONS OF 28 U.S.C. §2254(b), AND WITH PRIOR APPLICABLE DECISIONS OF THIS COURT

The Seventh Circuit held that:

> The uncontested facts here show that Serrano's attorney represented an important State witness while representing Serrano.
>
> We find that in view of the clear violation of Serrano's Sixth Amendment rights and in the interest of judicial economy we should not delay our decision here to await the State court's processing of Serrano's claim.
>
> We reverse the district court's finding that Serrano's Sixth Amendment rights were not violated.[1] (A-3).

The Seventh Circuit cited no authority in support of its decision to not permit the state courts to hear Serrano's effectiveness of counsel claim and this determination is contrary to the statutory provisions of 28 U.S.C. §2254 and the doctrines of federalism and comity as reflected in prior decisions of this Court. It is well settled law that normally a

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[1]The District Court had made no finding concerning Serrano's Sixth Amendment rights relating to his counsel's alleged conflict of interest since that issue was not presented to the District Court. The District Court did address and reject the Sixth Amendment speedy trial claim presented by the petitioner.

state prisoner must exhaust available state remedies before a federal court will entertain his petition for a writ of habeas corpus. *Ex parte Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886). The doctrine of exhaustion of state remedies reflects a policy of comity between state and federal courts, "an accommodation of our federal system designed to give the state an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording v. Swenson*, 404 U.S. 249, 250, 92 S.Ct. 407, 409, 30 L.Ed.2d 418 (1971); *Picard v. Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); *Fay v. Noia*, 372 U.S. 391, 438, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Where a state petitioner asserts a claim cognizable under federal habeas corpus that was not presented to the state appellate courts, but which could be heard in some form of state post-conviction review proceeding, that remedy must be pursued before federal habeas corpus will lie. 28 U.S.C. §2254(c); *Picard, supra*, 404 U.S. at 277, n.3, 275-276; *Pitchess v. Davis*, 421 U.S. 482, 487-488, 95 S.Ct. 1748, 44 L.Ed.2d 317 (1975); *Ex parte Hawk*, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944). The exhaustion requirement is a "strong policy." *Preiser v. Rodriguez*, 411 U.S. 475, 490, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973).

On appeal to the Seventh Circuit, Serrano candidly admitted that the effectiveness of counsel issue was being presented for the first time and had not been presented to the state courts or to the District Court. So long as there is any avenue by which this issue may be raised in state courts, than a state prisoner has not exhausted his state court remedies. 28 U.S.C. §2254(c); *Picard v. Connor, supra; Pitchess v. Davis, supra.* The State of Indiana provides a procedure for post-conviction remedy by which convicted persons may raise issues not presented in their direct appeals. Section 1 of Post-Conviction Remedy Rule 1 specifically provides that:

(a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and show claims

(1) *that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;*

* * *

(4) *that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;*

* * *

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy; may institute at any time a proceeding under this rule to secure relief.
(emphasis added).

One of the purposes of the Indiana Post-Conviction Remedy is to allow a convicted criminal defendant ample opportunity to present claims for relief in state courts before resort may be had to the federal courts. *Langley v. State*, 256 Ind. 199, 267 N.E.2d 538 (1971). The Seventh Circuit and District Courts have held that prisoners may be able to obtain relief through the use of this procedure and that resort to this remedy was necessary to fully exhaust state remedies. *Evans v. Lane*, 419 F.2d 1337 (7th Cir. 1970); *Kidwell v. Phend*, 26 Ind. Dec. 106, (S.D. Ind. 1971). Respondent Serrano has, at no time presented the argument that resort to the Post-Conviction remedies would be futile and the Seventh Circuit did not rely on this theory.

Thus, Serrano did not present the question of ineffectiveness of counsel to the state courts as required by U.S.C. §2254(b). The decision of the Seventh Circuit not to require Serrano to exhaust his state remedies is contrary to

the provisions of 28 U.S.C. §2254(b) and is in conflict with applicable decisions of this Court.

II.

THE SEVENTH CIRCUIT ERRED (1) IN DETERMINING THAT THE UNCONTESTED FACTS SHOW THAT AT THE TIME OF TRIAL SERRANO'S ATTORNEY WAS REPRESENTING AN IMPORTANT STATE'S WITNESS AND (2) IN ESTABLISHING A *PER SE* RULE THAT SUCH REPRESENTATION DENIES EFFECTIVE ASSISTANCE OF COUNSEL

The Seventh Circuit held that Serrano's attorney represented an important state witness while representing Serrano. The testimony of Norma Hernandez, the state witness, on this question is:

Redirect Examination of Norma Hernandez

Q. Mrs. Hernandez, I believe you stated that you were in custody at the time you gave that statement; is that correct?

A. Yes.

Q. What were you in custody or arrested for?

A. We were arrested for robbery.

Q. Do you have an attorney?

A. Yes.

Q. Who is that?

A. Walker.

(Tr. 266).

Recross Examination by Mr. William Walker

Q. Is it a fact, isn't it, Mrs. Hernandez, that we have represented you on a traffic offense in East Chicago City Court?

A. Yes.

Q. And that is the extent of our representation of you up to this point?

A. Well, and when I asked you if you will represent me for going to court the 25th.

Q. Up to this time, I do not represent you?

A. No.

The above constitutes all of the evidence pertaining to representation of Mrs. Hernandez by Serrano's attorney. This testimony indicates that Serrano's attorney had represented the witness on a prior traffic ticket and that she had requested representation by that firm on a pending criminal charge, but that at the time of the trial, Serrano's attorney was not yet representing her. The record does not disclose whether the firm of Walker & Walker did, in fact, ultimately represent her or whether any communications had passed between them other than a simple request for representation. Reviewing this, one is necessarily "left with the definite and firm conviction that a mistake had been committed" by the Seventh Circuit. *United States v. United States Gypsum Company*, 333 U.S. 364, 395 (1948).

2.

Based upon the erroneous determination of the facts, the Seventh Circuit held:

> ...that without an informed consent by a defendant dual representation of his attorney of a prosecution witness is a *per se* violation of such defendant's Sixth Amendment rights. (A-3).

This is directly in conflict with this Court's decision in *Cuyler v. Sullivan* ___ U.S. ___, 100 S.Ct. 1708 (1980), in which this Court held that:

> Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist. *Id.*, at 1717.

While this Court has stated that there is a presumption that there is *no* conflict, the Seventh Circuit has held that there is an unrebuttable presumption that there *is* a conflict *and* that such conflict is a denial of Sixth Amendment rights.

In *Cuyler v. Sullivan, supra,* this Court also held that:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial *must demonstrate* that an actual conflict of interest adversely affected his lawyer's performance. *Id.*, S.Ct. at 1718. (Emphasis added).

The Third Circuit was reversed in *Cuyler* because it had relied upon a possible (as opposed to actual) conflict of interest. In this present case, there is at most a possible conflict. Respondent Serrano has certainly not *demonstrated* a conflict, as no conflict is apparent from the record and, as stated in Argument I, it was for the first time in the Seventh Circuit that the issue was raised. No record was developed in the state courts due to the failure to exhaust. No record was developed in the District Court because the issue was not raised. This underscores the argument made in Argument I, above.

The effect of the Seventh Circuit's *per se* rule on dual representation is being felt in other cases. On April 27, 1981, the District Court in a similar case, granted a writ of habeas corpus based upon the *per se* rule of *Ross v. Heyne,* 638 F.2d 979 (7th Cir. 1980), the very same case relied upon by the Seventh Circuit in this case. *William Cowell v. Jack Duckworth,* No. S81-93.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari to review the judgment and order of the Seventh Circuit should be granted.

Respectfully submitted,

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Appendix

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Heard: December 10, 1980
March 5, 1981.

Before
HON. LUTHER M. SWYGERT, Circuit Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. WESLEY E. BROWN, Senior District Judge*

Isadore Serrano, *Petitioner-Appellant,*	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 80-1658 vs.	)	
Jack Duckworth, *Respondent-Appellee.*	)	No. 79-C-74 Allen Sharp, *Judge.*

ORDER

This is an appeal from the dismissal of a pro se petition for habeas corpus filed under 28 U.S.C. §2254.

Serrano was indicted, tried and convicted of two counts of first degree murder by the State of Indiana. He was sentenced to life imprisonment as to Count II of the Indictment. He was not sentenced as to Count I. On appeal the conviction was affirmed. *Serrano v. State*, 360 N.E.2d 1257 (Ind. 1977).

The trial court filed its Memorandum and Order on June 8, 1979 denying the writ. Serrano's application for an

*The Honorable Wesley E. Brown, Senior District Judge of the United States District Court for the District of Kansas, is sitting by designation.

appeal, pursuant to Rule 22(b) F.R.Cr.P., was denied June 29, 1979. This Court granted Serrano's request for issuance of a certificate of probable cause. He was permitted to proceed in forma pauperis and an attorney was appointed to represent him in this Court.

Two issues are raised by Serrano:

First, his Sixth Amendment rights were violated because his attorney also represented Norma Hernandez, an important state witness, while defending Serrano.

Second, there was not sufficient evidence to have found Serrano guilty beyond a reasonable doubt.

The State of Indiana contends that there was ample evidence for the jury to find Serrano guilty and in addition, Serrano has not exhausted his state remedies as required by 28 U.S.C. §2254.[1]

After Judge Sharp had issued his Order this Court rendered its decision in *Magnolia Ross v. Robert Heyne and Theodore L. Sendak*, ___ F.2d ___, decided December 10, 1980. There, the Court said,

> "'In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, ___ U.S. at ___. An actual conflict would arise where defense counsel is unable to cross-examine a

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[1] §2254. State custody; remedies in Federal courts.

* * *

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

prosecution witness effectively because the attorney also represented the witness. *United States v. Mavrick*, 601 F.2d 921, 931 (7th Cir. 1979). The problem that arises when one attorney represents both the defendant and the prosecution witness is that the attorney may have privileged information obtained from the witness that is relevant to cross-examination, but which he refuses to use for fear of breaching his ethical obligation to maintain the confidences of his client. *See* Code of Professional Responsibility, Cannon 4 & DR 4-101(B)(2). 'The more difficult problem which may arise is the danger that counsel may overcompensate and fail to cross-examine fully for fear of misusing his confidential information.' *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975). *cert. denied*, 423 U.S. 1066 (1976)."

Thus, it was held in *Magnolia Ross* that without an informed consent by a defendant dual representation of his attorney of a prosecution witness is a *per se* violation of such defendant's Sixth Amendment rights.

The uncontested facts here show that Serrano's attorney represented an important State witness while representing Serrano.

We find that in view of the clear violation of Serrano's Sixth Amendment rights and in the interest of judicial economy we should not delay our decision here to await the State court's processing of Serrano's claim.

We reverse the district court's finding that Serrano's Sixth Amendment rights were not violated.

In view of our determination on the Sixth Amendment issue we need not and do not decide the sufficiency of the evidence issue.

REVERSED and REMANDED for proceedings consistent with the views expressed herein.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ISADORE SERRANO	)	
	)	
Petitioner	)	
	)	
v.	)	No. S 79-74
	)	
JACK DUCKWORTH, Warden	)	
	)	
Respondent	)	

MEMORANDUM AND ORDER

In the petition for a writ of habeas corpus, petitioner challenges his trial and conviction for first degree murder and murder in the perpetration of or attempt to perpetrate rape. On direct appeal to the Indiana Supreme Court his conviction was unanimously affirmed in *Serrano v. State*, 360 N.E. 2d 1257 (1977). Petitioner alleges first, that the trial court erred in overruling his motion for discharge under Indiana Criminal Rule 4(B) dealing with speedy trial; second, that the trial court erred in excluding from evidence results of polygraph tests; and third, that the evidence was insufficient as a matter of law to support a guilty verdict.

The petitioner had the benefit of counsel both at trial and on appeal. A full and complete state court record has been submitted to this Court and carefully considered in regard to all allegations. See *Townsend v. Sain*, 372 U.S. 293 (1963).

A. The Speedy Trial Issue

Petitioner's first allegation is that he filed a motion for an early trial on July 31, 1974 (R. 28) under Indiana Rule of Criminal Procedure 4. Rule 4(B) provides if any defendant shall move for an early trial, he shall be discharged if not brought to trial within 70 days of the date of such motion, except where the delay is caused by his act or the congestion of the court. The trial did not commence until June 9, 1975 (R. 59), over ten months after the motion for an early trial. Petitioner contends this was a clear violation of the 70 day time limit imposed by Indiana Rule of Criminal Procedure 4. The Indiana Supreme Court held that Serrano failed to object in a timely fashion to the setting of a trial date and was therefore deemed to have acquiesced in and waived that objection. *Serrano v. State, supra,* 360 N.E. 2d at 1259; *Utterback v. State,* 261 Ind. 685, 310 N.E. 2d 552 (1974). The Court found nothing in the record other than the filing of an early trial motion, to indicate that the defendant's claim that he sought an early trial was bona fide. *Serrano v. State, supra,* 360 N.E. at 1259. In effect that court found the defendant had not been denied his right to a speedy trial due to a procedural waiver.

The threshold question is whether the petitioner has stated a cause cognizable in federal habeas corpus. This relief is available to a prisoner only upon a showing that the State denied him his constitutional rights in a state criminal proceeding. 28 U.S.C. §2254(a); *Stone v. Powell,* 428 U.S. 465 (1976); *Mabra v. Gray,* 518 F. 2d 512 (7th Cir. 1975), cert. den. 423 U.S. 1023 (1975). Petitioner at trial and on appeal, expressly relied on Indiana Rule of Criminal Procedure 4 and the Indiana Constitution, Article I, Section 12, claiming a violation of his generalized right to a speedy trial. The success or failure of this claim was predicated upon mathematical calculations of the 70 day period and who was responsible for the various delays. Examination of the entire record discloses no indication of an attack upon the prosecution as violative of the Sixth

Amendment speedy trial clause. Petitioner's reliance on Indiana Rule of Criminal Procedure 4 in no way asserted a constitutional speedy trial claim. It is fundamental that the interpretation of a state statute and Constitution by the State's highest tribunal is binding upon the federal courts in a habeas corpus proceeding. *Paterno v. Lyon*, 334 U.S. 314 (1948). It has been held that interpretation of a state speedy trial act is not a proper function for a federal court under its habeas corpus jurisdiction. *Israel v. Odom*, 521 F. 2d 1370 (7th Cir. 1975); *United States ex rel Little v. Twomey*, 477 F. 2d 767 (7th Cir. 1973), cert. den. 414 U.S. 846 (1973).

The Sixth Amendment right to a speedy trial is applicable in state criminal proceedings by virtue of the due process clause of the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *Jones v. Morriss*, 590 F. 2d 684 (7th Cir. 1979), cert. den. 99 S. Ct. 1513 (1979). In a habeas corpus proceeding the court can decide only whether the petitioner's federal constitutional right to a speedy trial was violated. *Jones v. Morris, supra*, 590 F. 2d at 770.

The petitioner is here pro se and accordingly such complaints are held to less stringent standards than formal pleadings drafted by lawyers. *Haines v. Kerner*, 404 U.S. 519 (1972), reh. den. 404 U.S. 948 (1972). On its face the complaint relies on Indiana Rule of Criminal Procedure 4 which is a speed trial act, the essence of the claim is the Sixth Amendment speedy trial clause. Under the circumstances of over a ten month delay in trial and the fact that this is a pro se complaint, *Haines, supra*, requires us to give the petitioner the benefit and recognize his constitutional claim. However, we find that the petitioner's constitutional claim was not fairly presented to the State Court of Appeals in keeping with the policy of federal-state comity. This is designed to give the State an initial opportunity to pass upon and correct alleged violations of

its prisoners federal rights. *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Fay v. Noia*, 372 U.S. 391, 419-420 (1963).

It appears that no avenue of relief in state court remains open to petitioner for his constitutional speedy trial claim. The Indiana Rules of Appellate Procedure, Rule 8.3(7), requires that each error appellant intends to raise on appeal be set forth specifically and followed by the argument thereto. Subsequent interpretation of this holds that issues not argued in the brief are deemed waived. *Foster v. State*, 262 Ind. 567, 320 N.E. 2d 745 (1974); *Public Service Commission v. Indiana Bell Telephone Co.*, 232 Ind. 322, 108 N.E. 2d 889 (1963). Accordingly, we cannot say he has failed to exhaust his state remedies. *Humphrey v. Cady*, 405 U.S. 504, 516 (1972).

Therefore, we must consider whether petitioner's failure to raise on appeal a constitutional speedy trial claim bypassed state procedures so as to preclude federal habeas corpus review. A sequence of cases addresses this issue beginning with *Fay v. Noia*, *supra*, and culminate with *Wainwright v. Sykes*, 433 U.S. 72 (1977).

Petitioner Noia, in *Fay v. Noia*, *supra*, failed to bring an appeal of his state conviction and his later coram nobis action was therefore procedurally barred. The court held he was still entitled to habeas review and would not be barred by procedural defaults unless there had been a "deliberate bypass". *Fay v. Noia*, *supra*, at 439. The court went on to enunciate the classic definition of waiver as "an intentional relinquishment of a known right or privilege." *Fay v. Noia*, *supra*, at 439; *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Subsequent decisions have limited the effect of *Fay*. In *Francis v. Henderson*, 425 U.S. 536 (1976), the court held that a habeas petitioner's failure to raise pretrial his objection to grand jury composition, as required by state procedural rules, barred consideration of that claim in federal habeas. Id. at 542. The standard enunciated required the petitioner to show cause for the procedural

waiver and actual prejudice flowing from it. Id. at 542. In *Wainwright v. Sykes, supra*, the court expressly applied the "cause and prejudice" test to contentions of federal law which were not resolved on the merits in the state proceeding due to respondent's failure to raise them there as required by state procedure and expressly rejected the *Fay* test. Id. at 87-88.

It remains unclear which waivers are to be evaluated under the *Fay* "deliberate bypass" standard and which are under the *Francis* "cause and prejudice" standard. Separate concurrences in *Wainwright* by Chief Justice Burger and Mr. Justice Stevens clarify the question. The court is more apt to find a habeas petitioner bound by a bypass with respect to a tactical decision committed by counsel, more so than decisions entrusted to the defendant himself. *Wainwright, supra*, at 2508, n. 14 (concurring, Burger); *Estelle v. Williams*, 425 U.S. 501 (1976); *Ennis v. LeVre*, 560 F. 2d 1072, 1075 (2d Cir. 1977): *Rinehart v. Brewer*, 561 F. 2d 126, 130 n. (8th Cir. 1977).

Both the Second and Eight Circuits have observed that where waiver relates to counsel's tactical decisions concerning which legal issues will be urged on appeal is uniquely within the lawyer's competence and left to his judgment. *Ennis v. LeVre, supra, Rinehart v. Brewer, supra.* Lacking any showing of "cause and prejudice", *Francis v. Henderson, supra, Wainwright v. Sykes, supra,* we find that the petitioner is bound by his counsel's decision not to press the constitutional speedy trial issue. Accordingly, the claim is inappropriate for review.

Petitioner's second allegation deals with the refusal of the trial court to allow him to introduce the results of two polygraph tests which had been administered to him. The Indiana Supreme Court has held that the results of polygraph tests are not admissible in court as evidence, absent waiver or stipulation, because they are not sufficiently accurate. See, *Vacendak v. State*, 262 Ind. 101,

340 N.E. 2d 352 at 357 (1976). The court held that in petitioner's case there was no waiver or stipulation, *Serrano v. State, supra*, 360 N.E. 2d at 1259, 1260, and the evidence was properly excluded.

Evidentiary disputes relating to admission of polygraph tests, where the state courts have held them inadmissible because of unreliability, do not present questions of constitutional magnitude. *U.S. ex rel Sadowy v. Fay*, 189 F. Supp. 150 (S.D. N.Y. 1960), affirmed 284 F. 2d 426 (2d Cir. 1960), cert. den. 81 S. Ct. 814, 365 U.S. 850, 5 L. Ed. 2d 814 (1961). The trial court's decision to exclude the results of the polygraph testing, based on state law, did not violate petitioner's due process rights and the question is not cognizable in federal habeas corpus proceedings. See, *U.S. ex rel Sadowy v. Fay*, 284 F. 2d at 427.

Petitioner's final claim is that the evidence presented was insufficient as a matter of law to support a conviction. The question of sufficiency of the evidence is one of state law and habeas relief on that ground is available only where the state court conviction is totally devoid of evidentiary support. *Moore v. Duckworth*, 581 F. 2d 639 (7th Cir. 1978); *Wilson v. Parrat*, 540 F. 2d 415 (8th Cir. 1976). There is a difference between a conviction based upon evidence deemed insufficient as a matter of state criminal law and one so totally devoid of evidentiary support as to raise a question of due process, and it is only in the latter situation that there has been a violation of constitutional rights which afford a state prisoner a remedy in federal court on a writ of habeas corpus. *Faust v. State of North Carolina*, 307 F. 2d 869 (4th Cir. 1962), cert. den. 83 S. Ct. 547, 371 U.S. 964, 9 L. Ed. 2d 511 (1962), see also, *Mercado v. Massey*, 536 F. 2d 107 (5th Cir. 1976). Federal habeas corpus will not lie to inquire into the sufficiency of evidence in support of a guilty verdict unless there is a total lack of credible evidence. *Wilson v. Parrat, supra; Talavera v. Wainwright*, 547 F. 2d 1238 (5th Cir. 1977).

In this case the transcript and record of proceedings in the state court establishes that there was circumstantial evidence linking petitioner to the crime and the victim. Witnesses placed petitioner near the scene of the murder at about the time the crime was committed, wearing clothing similar to that worn by a man seen running from the area where the body was found (Tr. 292-294, 299-301, 304), and witnesses established that petitioner had bruises and scratches on his hand after the time that the crime was committed. (Tr. 307, 314, 316-317). Norma Hernandez testified that petitioner had told her that he had killed Debra Gomez (Tr. 255). Petitioner also told her that Debra Gomez was a former girl friend of his and that he hated her (Tr. 267). At trial Norma Hernandez testified that she gave the statement to the police while she was in their custody on investigation of a criminal charge, that she did not believe that petitioner actually killed Debra Gomez and that she told the police about the incident only because she "wanted to get out of there", (Tr. 260-266). The jury was aware of the circumstances of the confession and the fact that she personally did not believe petitioner's statement. The jury was able to weigh these factors and observe the credibility of the witness, and they chose to take petitioner's statement at face value.

Federal courts will only review sufficiency of the evidence questions in state criminal convictions if the record is totally devoid of evidentiary support, *Wilson v. Parrat, supra, Talavera v. supra,* and that is not the case here. The record of proceedings in this case establishes that there was credible evidence to support petitioner's conviction.

For the foregoing reasons, petitioner's due process rights have not been violated.

As there are no questions raised which state a claim upon which habeas corpus relief can be granted, it is hereby ORDERED that the petitioner for writ of habeas corpus be and hereby is DENIED.

Enter June 8, 1979.

/s/ Allen Sharp
Judge, United States District Court

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

CIVIL ACTION FILE NO. S79-74

ISADORE SERRANO	)	
	)	
vs.	)	JUDGMENT
	)	
JACK DUCKWORTH	)	

This action came on for (hearing) before the Court, Honorable Allen Sharp, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff Isadore Serrano have and recover nothing from defendant, Jack Duckworth, Warden, and Petition for Writ of Habeas Corpus is denied, as set forth in the Memorandum and Order entered this date.

Dated at South Bend, Indiana, this 8th day of June, 1979.

RICHARD E. TIMMONS
Clerk of Court

by /s/ ELEANORE J. EUGSTROM
Deputy Clerk

ORIGINAL

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-2041

JACK DUCKWORTH, Petitioner

vs.

ISADORE SERRANO, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Cases and Authorities	ii
Questions Presented	1
Statement of the Case	2
Reasons for Denying the Writ	3
1. The Seventh Circuit's Decision Is Not in Conflict with Either the Provisions of 28 U.S.C. §2254(b) Or Any Applicable Decision of This Court	3
2. This Court Should Not Review the Seventh Circuit's Factual Determination That Respondent Was Denied Effective Assistance of Counsel	5
Conclusion	7
Appendix	A-1

TABLE OF CASES AND AUTHORITIES

CASES:	Page:
Cuyler v. Sullivan, _____ U.S. _____, 100 S.Ct. 1708 (1980).....	3,4,6,7
Fay v. Noia, 372 U.S. 391 (1963).....	4
Frisbie v. Collins, 342 U.S. 519 (1952).....	4
Magnolia Ross v. Robert Heyne and Theodore L. Sendak, 638 F.2d 979 (7th Cir. 1980).....	7
Roberts v. LaVallee, 389 U.S. 40 (1967).....	6
United States v. Johnston, 268 U.S. 220 (1924).....	6
STATUTES:	
28 U.S.C. §2243.....	5
28 U.S.C. §2254.....	4,5
28 U.S.C. §2254(b).....	1,3,5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-2041

JACK DUCKWORTH, Petitioner

vs.

ISADORE SERRANO, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The respondent Isadore Serrano, respectfully requests that this Court deny the petition for writ of certiorari to review the judgment, entered on March 5, 1981, of the United States Court of Appeals for the Seventh Circuit.

QUESTIONS PRESENTED

1. Whether the decision of the Seventh Circuit is in conflict with the provisions of 28 U.S.C. §2254(b) and with prior applicable decisions of this Court.

2. Whether this Court should review the Seventh Circuit's determination that the facts show that an actual conflict of interest adversely affected the performance of petitioner's attorney.

STATEMENT OF THE CASE

On February 26, 1974, an affidavit for cause and information was filed against the respondent, Isadore Serrano, charging him with two counts of First Degree Murder. A probable cause hearing was held and the Lake Superior Court, Criminal Division, found that probable cause existed for respondent's arrest. Respondent was indicted by the Lake County Grand Jury in Cause No. 374-199, said indictment being for two counts of First Degree Murder.

On April 25, 1974, the law firm of Walker and Walker entered their appearance on behalf of the respondent.

The trial commenced on June 9, 1975 and the State rested its case on June 10, 1975. Counsel for respondent proceeded with his case on June 10, 1975 and final arguments were given on June 11, 1975. The jury found respondent guilty of both counts of murder. The court sentenced the respondent to life imprisonment as to Count II and withheld sentence as to Count I.

Respondent's petition to proceed in forma pauperis before the Indiana Supreme Court was granted on March 16, 1976. On March 31, 1977 the judgment of the trial court was affirmed. Serrano v. State, 360 N.E.2d 1257 (Ind. 1977).

Respondent petitioned the United States District Court for the Northern District of Indiana for a Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. The District Court, per Judge Sharp, denied the petition on June 8, 1979. Serrano v. Duckworth, No. S 79-74 (N.D. Ind., filed June 8, 1979). On June 18, 1979, respondent petitioned the District Court requesting a certificate of probable cause pursuant to 28 U.S.C. §2253 and F.R.A.P. 22(b). The District Court denied the petition on June 29, 1979.

The United States Court of Appeals For the Seventh Circuit granted respondent's request for issuance of a certificate of probable cause pursuant to F.R.A.P. 22(b) on May 14, 1980. Respondent was granted leave to proceed on appeal in forma pauperis and counsel was appointed to represent him pursuant to the provisions of the Criminal Justice Act.

In an opinion filed on March 5, 1981, the Seventh Circuit reversed the decision of the District Court that respondent's Sixth Amendment rights had not been violated and remanded the case for further proceedings.

REASONS FOR DENYING THE WRIT

1. The Seventh Circuit's Decision Is Not in Conflict with Either the Provisions of 28 U.S.C. §2254(b) Or Any Applicable Decisions of This Court.

In Cuyler v. Sullivan, 100 S.Ct. 1708 (1980) this Court considered, inter alia, whether mutual representation by the same attorneys of several defendants created, as a matter of law, a violation of the Sixth Amendment. The Court held:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. In Glasser v. United States, for example, the record showed that defense counsel failed to cross-examine a prosecution witness whose testimony linked Glasser with the crime and failed to resist the presentation of arguably inadmissible evidence. 315 U.S., at 72-75, 62 S.Ct. at 465-467. The Court found that both omissions resulted from counsel's desire to diminish the jury's perception of a codefendant's guilt. Indeed, the evidence of counsel's "struggle to serve two masters [could not] seriously be doubted." Id., at 75, 62 S.Ct., at 467. Since this actual conflict of interest impaired Glasser's defense, the Court reversed his conviction. (100 S.Ct. at 1718)

The Seventh Circuit, applying the Cuyler criteria, determined that respondent's attorney had an actual conflict of interest when he represented the State of Indiana's key witness while also representing the respondent. Further, the Seventh Circuit found that this conflict adversely affected the performance of respondent's counsel. In light of this clear violation the district court's decision was reversed and the case remanded.

Petitioner contends that the Seventh Circuit's decision not to delay its decision to await the state court's processing of respondent's Sixth Amendment claim is in conflict with the provisions of 28 U.S.C. §2254 and this Court's prior decisions relating to the exhaustion of state remedies. Respondent respectfully submits that even a cursory review of the authorities reveals there is no such conflict.

This Court has long recognized that judicial discretion was the concept from which the federal courts fashioned the rule of exhaustion of state remedies in habeas corpus proceedings. The exhaustion rule is not one delimiting the power of the courts but rather one which relates to the appropriate exercise of power. Fay v. Noia, 372 U.S. 391, 420 (1963). "Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles." Id. at 438. Implicit in the concepts of discretion and equity is the notion that the courts should give special consideration to special circumstances. Thus, in Frisbie v. Collins, 342 U.S. 519, (1952), this Court stated:

> As explained in Darr v. Burford, 339 U.S. 200, 210, this general rule [of exhaustion of state remedies] is not rigid and inflexible; district courts may deviate from it and grant relief in special circumstances. Whether such circumstances exist calls for a factual appraisal by the court in each special situation.

Indeed, when the doctrine requiring the exhaustion of state remedies was codified in 28 U.S.C. §2254, this notion of judicial discretion was retained.[1/] 28 U.S.C. §2254 (b) provides:

* * *

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. (emphasis added).

Respondent contends that there are circumstances neither more special nor which could render resort to the State of Indiana's corrective process more ineffective to protect respondent's rights than those in the present case where the Seventh Circuit has found a clear violation of the respondent's Sixth Amendment right to effective assistance of counsel.

As for petitioner's contention that the Seventh Circuits decision is contrary to the policy of comity, in an echo of

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1/ Similar provision for the exercise of judicial discretion is made in 28 U.S.C. §2243. This section provides in pertinent part:

> §2243. Issuance of writ; return; hearing; decision
>
> A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith aware the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application or person detained is not entitled thereto.
>
> * * *
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. (emphasis added.)

this Court's opinion in Roberts v. LaVallee, 389 U.S. 40, 43 (1967), one "...can conceive of no reason why the State would wish to burden its judicial calendar with a narrow issue the resolution of which is predetermined by established federal principles."

It is respectfully submitted that to require briefing and oral argument on the merits of the petition in light of these circumstances would not be a worthwhile exercise of this Court's discretion. The petition should therefore be denied.

2. This Court Should Not Review the Seventh Circuit's Factual Determination That Respondent Was Denied Effective Assistance of Counsel.

The Seventh Circuit found that the uncontested facts show that respondent's attorney represented an important state witness while representing respondent. Petitioner urges that this Court grant its petition in order to review this finding which petitioner contends is an "erroneous determination of the facts." This contention, however, does not pass muster as a reason for allowing the writ for, as Mr. Justice Holmes wrote, this Court does "not grant certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1924).

Petitioner seeks to evade this Court's general practice with respect to reviewing the findings of fact of lower courts by arguing that the Seventh Circuit has fashioned a per se rule. Clearly the Seventh Circuit has fashioned no such rule.

This Court held in Cuyler, supra, 100 S.Ct.at 1718, that a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his

lawyer's performance in order to establish a violation of his Sixth Amendment rights. The Seventh Circuit's review of the facts below revealed not only that respondent's attorney represented an important prosecution witness while representing respondent but also that this dual representation was without respondent's informed consent. The Seventh Circuit determined that the facts of the case met all the criteria necessary to establish a violation of the Sixth Amendment as those criteria had been identified in this Court's decision in Cuyler and later amplified in the Seventh Circuit's own decision in Magnolia Ross v. Robert Heyne and Theodore L. Sendak, 638 F.2d 979 (1980).

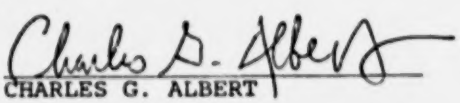
Petitioner, by excerpting a portion of one sentence from the Seventh Circuit's opinion wherein the phrase per se is used, seeks to convince this Court that the Seventh Circuit's findings of fact and conclusions of law resulted from the application of a per se rule. A review of the opinion below in its entirety plainly establishes that this argument is without merit. Accordingly, this petition should be denied.

CONCLUSION

For these reasons, respondent respectfully submits that the Petition for Writ of Certiorari to review the judgment and order of the Seventh Circuit should be denied.

Dated: July 1, 1981.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Heard: December 10, 1980
March 5, 1981

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Wesley E. Brown, Senior District Judge*

Isadore Serrano, Petitioner-Appellant,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 80-1658 vs.	)	
Jack Duckworth, Respondent-Appellee.	)	No. 79-C-74 Allen Sharp, Judge.

ORDER

This is an appeal from the dismissal of a pro se petition for habeas corpus filed under 28 U.S.C. §2254.

Serrano was indicted, tried and convicted of two counts of first degree murder by the State of Indiana. He was sentenced to life imprisonment as to Count II of the Indictment. He was not sentenced as to Count I. On appeal the conviction was affirmed. Serrano v. State, 360 N.E.2d 1257 (Ind. 1977).

The trial court filed its Memorandum and Order on June 8, 1979 denying the writ. Serrano's application for an appeal, pursuant to Rule 22(b) F.R.Cr.P., was denied June 29, 1979. This Court granted Serrano's request for issuance of a certificate of probable cause. He was permitted to proceed in forma pauperis and an attorney was appointed to represent him in this Court.

Two issues are raised by Serrano:

First, his Sixth Amendment rights were violated because his attorney also represented Norma Hernandez, an important state witness, while defending Serrano.

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*/ The Honorable Wesley E. Brown, Senior District Judge of the United States District Court for the District of Kansas, is sitting by designation.

Second, there was not sufficient evidence to have found Serrano guilty beyond a reasonable doubt.

The State of Indiana contends that there was ample evidence for the jury to find Serrano guilty and in addition, Serrano has not exhausted his state remedies as required by 28 U.S.C. §2254.[1/]

After Judge Sharp had issued his Order this Court rendered its decision in Magnolia Ross v. Robert Heyne and Theodore L. Sendak, _____ F.2d _____, decided December 10, 1980. There, the Court said,

> "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, _____ U.S. at _____. An actual conflict would arise where defense counsel is unable to cross-examine a prosecution witness effectively because the attorney also represented the witness. United States v. Mavrick, 601 F.2d 921, 931 (7th Cir. 1979). The problem that arises when one attorney represents both the defendant and the prosecution witness is that the attorney may have privileged information obtained from the witness that is relevant to cross-examination, but which he refuses to use for fear of breaching his ethical obligation to maintain the confidences of his client. See Code of Professional Responsibility, Cannon 4 & DR 4-101(B)(2). 'The more difficult problem which may arise is the danager that counsel may overcompensate and fail to cross-examine fully for fear of misusing his confidential information' United States v. Jeffers, 520 F.2d 1256, 1265 (7th Cir. 1975), cert. denied, 423 U.S. 1066 (1976)."

1/ §2254. State custody; remedies in Federal courts.

* * *

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Thus, it was held in Magnolia Ross that without an informed consent by a defendant dual representation of his attorney of a prosecution witness is a per se violation of such defendant's Sixth Amendment rights.

The uncontested facts here show that Serrano's attorney represented an important State witness while representing Serrano.

We find that in view of the clear violation of Serrano's Sixth Amendment rights and in the interest of judicial economy we should not delay our decision here to await the State court's processing of Serrano's claim.

We reverse the district court's finding that Serrano's Sixth Amendment rights were not violated.

In view of our determination on the Sixth Amendment issue we need not and do not decide the sufficiency of the evidence issue.

REVERSED and REMANDED for proceedings consistent with the views expressed herein.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-2041

JACK DUCKWORTH, Petitioner

vs.

ISADORE SERRANO, Respondent

AFFIDAVIT OF SERVICE

I, Charles G. Albert, counsel for petitioner, on oath swear that on this 1st day of July, 1981, one copy of the Brief of Respondent In Opposition to the Petition for a Writ of Certiorari was mailed, postage prepaid to Linley E. Pearson, Esq., Attorney General of the State of Indiana, 219 State House, Indianapolis, Indiana 46204, Counsel for Petitioner. I further swear that all parties required to be served have been served.

Charles G. Albert

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Counsel for Respondent

Subscribed and sworn to
before me this 1st day
of July, 1981.

Notary Public